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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1697

PACIFIC MARITIME ASSOCIATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 50 IN REPLY TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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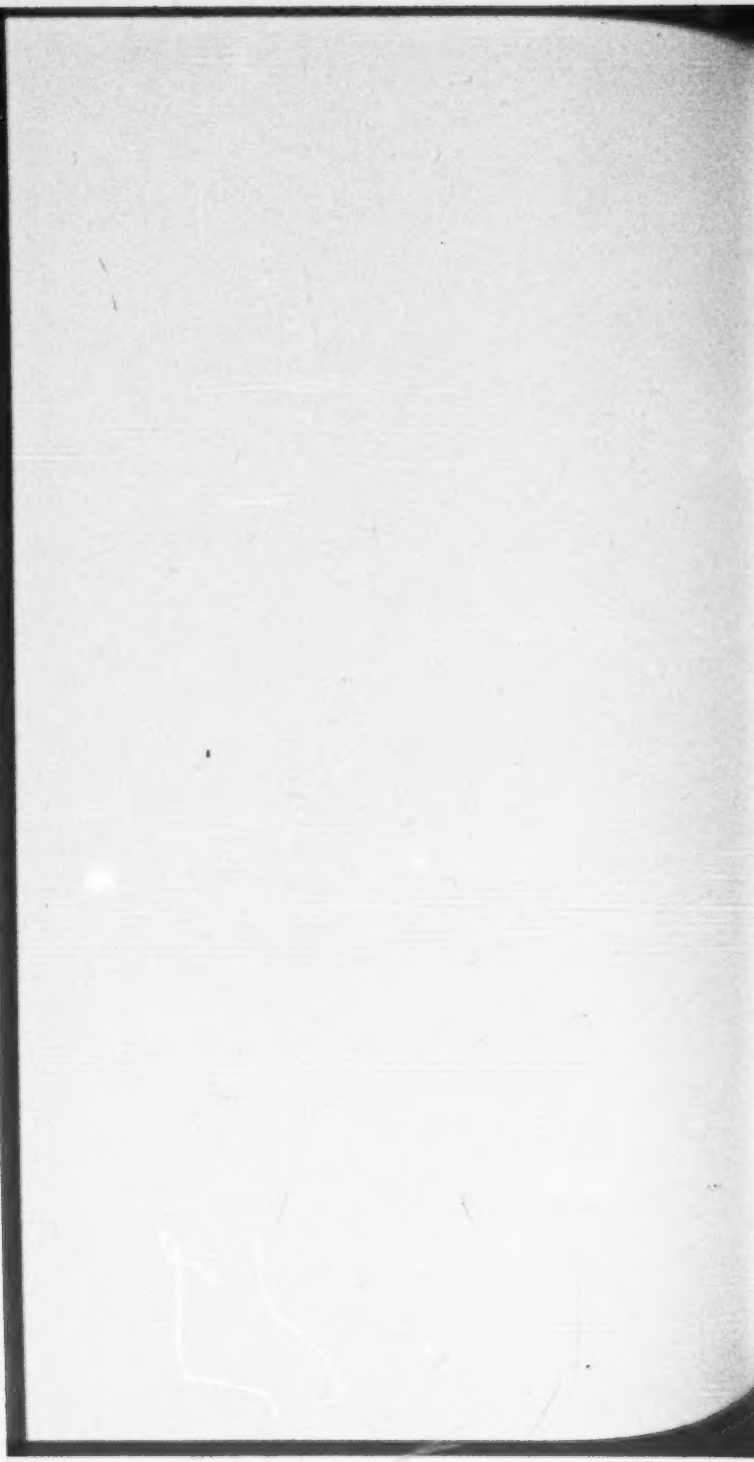

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International Longshoremen's and Warehousemen's Union, Local 50 (hereinafter "Local 50"), a party to the proceeding below, files this brief in view of the content of the Board's brief in opposition to the peti-

tion filed by Pacific Maritime Association (hereinafter "PMA").

OPINIONS BELOW

The opinion of the court of appeals is reported at 457 F.2d 572. It is set out in the appendix to the petition at 21-30. The decisions and orders of the district court are not reported. They are set out in the appendix to the petition at 32-34.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 14, 1972, and a timely petition for rehearing was denied on April 26, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether law provides judicial review of a Labor Board final order that dismissed a litigated jurisdictional dispute charge on the ground that a nonreviewable "interlocutory order" adjudicated the merits of the underlying jurisdictional dispute contrary to the position of the person filing the charge.

2. Whether the Act provides that a Labor Board order in a §10(k) proceeding to determine a jurisdictional dispute is to be made "binding" by sanctions of law so that the Board cannot enter its final ad-

judication dismissing a charge on the basis of its decision in such a proceeding before it has gained compliance by the parties to the dispute with its decision.

3. Whether descriptive language in an opinion of this Court, which purports to set forth the meaning of a statute in broad strokes, should be accepted by the lower courts as a binding interpretation of the statute when the lower court must determine the statute's meaning in an aspect not litigated before this Court.

STATEMENT

PMA, the employer, filed a jurisdictional dispute charge with the Labor Board in April, 1969. It named Local 701 of the International Union of Operating Engineers (the Engineers union) as a party to a jurisdictional dispute that had become acute. The filing of this charge required the Board to institute a proceeding under §10(k) of the Act "to hear and determine" the underlying dispute, which involved rival claims to the driving of floating cranes used in longshore work at Astoria, Oregon. Section 10(k) requires the dismissal of such a charge, without any issuance of the Board's usual "cease and desist" type order, "upon compliance by the parties to the dispute with the decision of the Board".

The Board held a vigorously contested 16-day hearing under §10(k). Local 50, PMA, and two PMA companies (Brady and Jones) participated fully in

the litigation of the underlying dispute. Thereafter, the Board entered its §10(k) order. It is unlawful for a variety of reasons. One is the Board's reliance upon an interpretation of the ILWU-PMA collective bargaining contract that not only is clearly incorrect but is directly contrary to an express award of the arbitrator on the precise issue before the Board. This action is in direct violation of federal law. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960).

On the basis of this error of law, the Board denied the claim of Local 50 and PMA that the work should be done by longshoremen. Local 50 and PMA filed petitions for review of the §10(k) order. Each was dismissed on the ground that it sought review of an "interlocutory order" that could be reviewed in court on motion of the aggrieved party only after issuance of a final order of the Board (Pet. App. 29).

The Board's §10(k) proceeding has had the support of an ancillary injunction entered under §10(1) of the Act, which is to continue in effect "pending the final adjudication of the Board". After entry of the §10(k) order, a motion was filed with the district court asking that the injunction be dissolved insofar as it restrained the Engineers union, on the ground that that union had won the §10(k) case. PMA and Local 50 opposed the motion on the ground that specific, atypical language in §10(k) of the Act prevents the Board from entering its final adjudication as to the underlying jurisdictional dispute matter until it has obtained compliance with its decision by "the

parties to the dispute" and that such adjudication might have to await judicial review of the §10(k) decision. It was pointed out that the Board's usual function of preventing unfair labor practices is not its function in jurisdictional disputes and that the unique procedure of §10(k) is directed at getting a final order that disposes of the underlying dispute. The motion to modify the injunction was denied, and an appeal was taken.

On the basis of its decision on the merits in the §10(k) proceeding in favor of the Engineers union, the Board entered an order dismissing the part of the matter consisting of PMA's charge against that union. PMA filed a petition for review of this order under §10(f) of the Act, asserting that the unlawfulness of the "interlocutory" §10(k) order rendered unlawful the order dismissing the charge, which "followed as a matter of course" (457 F.2d 572, 577; Pet. App. 28). This was an order final as to PMA. It is aggrieved thereby. Review was denied, although review of this order is the only way PMA can get review of the §10(k) order.[1]

The court of appeals also disposed of issues as to the jurisdiction of the district court to continue its injunction. It stated that this Court has "rejected the premises" of the PMA's arguments, which were

[1]Any confusion on this point is clarified on consideration of the situation where there is a charge against only one union, which is normal, and where it wins the §10(k) decision. No union then could be aggrieved by any order that it is violating §8(b)(4)(D). The Board's position is that in this situation no review of the §10(k) order is available to anyone.

that the §10(k) order is to be made binding and, hence, there had been no lawful "final adjudication" and accordingly the district court had jurisdiction to refuse to modify its injunction (457 F.2d 575; Pet. App. 26). It cites and quotes from *NLRB v. Plasterers' Union,* 404 U.S. 116 (1971). The court of appeals gave no consideration to the fact that there was no claim in *Plasterers* that the statute directs that the parties to the dispute should be made "legally bound to observe the §10(k) decision" (404 U.S. 127; Bd. Br. 6).

If no one were ever "legally bound" under the "design of the Act", Local 50 would continue to be free to use the orderly processes of collective bargaining to get the work in dispute. These include the use of the arbitrator and of the courts to gain and enforce arbitration awards, confirming the one already obtained, requiring Brady and Jones to use longshoremen to drive appropriate gear to hoist logs at Astoria from the water to shipboard if the employer loads logs at Astoria. This leaves Brady and Jones, who are bound by the collective bargaining contract, with a number of choices:

1. Stop loading logs.
2. Stop loading logs at Astoria.
3. Use ship's gear to hoist logs at Astoria.
4. Load logs at Astoria with longshoremen continuing to drive the floating crane barges.

The last alternative will not be practicable should the district court injunction be dissolved as to the

Engineers union. Its picketing could cause the companies that bring logs into Astoria to cease doing business with Brady and Jones. For this reason, the PMA asserts that the non-binding character of the §10(k) order leaves Brady and Jones in the sort of position that *CBS* carefully says was to be eliminated through the use of the §10(k) procedure.[2] It was because the Board had not acted to gain binding effect to its §10(k) order that the district court refused to modify its injunction (Pet. App. 33-34).

ARGUMENT

I.

The Board's assertion that the court of appeals correctly decided that judicial review need not be provided establishes the momentousness of the issues here presented. The Board's contention that judicial review is not guaranteed to a party to the §10(k) proceeding is supported by two cases, which are discussed below. The Board does not mention *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which upheld the constitutionality of the Act on the ground that it did provide "adequate opportunity

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[2]This Court ruled that §10(k) was to prevent "the rival unions" from applying "other forms of pressure on the employer" for the work in dispute because this would leave the employer with "the same old basic jurisdictional dispute . . . continuing to vex him". *NLRB v. Radio & Television Broadcast Engineers (CBS)*, 364 U.S. 573, 570-580 (1961).

to secure judicial protection against arbitrary action" (301 U.S. 47).[3]

PMA's claim of right to judicial review of the dismissal of its charge is based on the language of §10(k), which sets up a special and unique procedure for the Board to follow with respect to the charges arising out of jurisdictional disputes. The filing of such a charge does not give the Board its normal power to proceed with the case if, in its discretion, it deems this to be desirable. Rather, "the Board is empowered and directed to hear and determine" the jurisdictional dispute; here the dispute is as to who should drive the floating cranes used in longshore work at Astoria, Oregon. The Board carried out this duty to adjudicate the matter by holding a vigorously contested 16-day hearing in which Local 50 and PMA, Brady and Jones fully participated. This led to the

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[3] *NLRB v. Plasterers Union*, 404 U.S. 116 (1971) holds that the employer is a party to the dispute and to the §10(k) litigation. If the employer party who fully participated in the §10(k) proceeding can be denied judicial review of an order arising out of that proceeding, there is a substantial possibility that a union aggrieved by a §10(k) order and any final order based on the §10(k) will similarly be said to be without right to judicial review of the merits of the §10(k) order.

Local 50 believes that it is entitled to have the §10(k) order set aside on the ground, inter alia, that it is based on the error of law in the Board's conclusion that the ILWU-PMA contract does not require the use of longshoremen to drive whatever equipment is used to hoist logs in loading them aboard ship. The Board's orders based on its error would deprive the ILWU longshoremen of their rights under this contract. They would thus be denied the consideration they gave for their agreeing to the modernization and mechanization program that has radically changed waterfront work on the Pacific Coast so as to reduce greatly the amount of labor required to get cargoes moved. The longshoremen are entitled to due process before they can be deprived of this property.

§10(k) order here under attack. Dismissal of PMA's charge "followed as a matter of course" on the basis of the substantive holding of the §10(k) order (Pet. App. 28). Where a charge is dismissed on the basis of litigation thereon, the ordinary rule is that this order is reviewable. *Auto Workers Local 283 v. Scofield,* 382 U.S. 205, 219 (1965). Hence, the order dismissing the jurisdictional dispute charge on the ground that the §10(k) order decided the issues against PMA was open to judicial review.

The Board asserts that the employer who has participated fully in the extended litigation of the issues as to the jurisdictional dispute, which had to take place because it filed a jurisdictional dispute charge, has no right to judicial review of the merits of the resulting §10(k) order. There is some obfuscation of this point by the statement that the employer's first petition seeking review of the §10(k) order was denied on September 29, 1970 (Bd. Br. 8). Since this denial was based on the ground that the petition was premature, as seeking review of an interlocutory order, failure to petition for a writ of certiorari at that time does not waive the right to raise the issue by a timely petition as to the court of appeals opinion on the final order. There is further obfuscation by the statement that the union may get a round-about review of "the propriety of the Section 10(k) determination" in connection with the review of the §8(b)(4)(D) finding (n. 6). Whatever that concession means, this possibility in this case does not satisfy the employer's right to judicial review, or even that

of the unsuccessful union, because in many cases there is only one charge and it may be against only the union winning the §10(k) decision. Review of the final order that follows "as a matter of course" from the §10(k) order is the only assurance of review to the person who acts to commence the jurisdictional dispute hearing.

The denial of the employer's right to judicial review could stand up only if the law requires the employer to be a neutral on the merits of the §10(k) order. *Plasterers* denies that premise. PMA can be aggrieved by an order denying its claim to relief under §10(k).[4] By seeking review of the order dismissing its charge that gave rise to the §10(k) proceeding, PMA properly brought the validity of the §10(k) order before the court of appeals for review and so properly brings its claim of right to judicial review to this Court.

That right exists. There is no "clear command" that precludes review. There is no "clear and convincing evidence" of an intention to create an exception to reviewability. The ordinary inference of the right of judicial review is not negated. Compare *Barlow v. Collins,* 397 U.S. 159, 166-167 (1970).

The Board argues that no "right to due process" is involved in view of this Court's holding in *Switchmen's Union v. National Mediation Board,* 320 U.S.

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[4]The employer filing a jurisdictional dispute charge is not seeking issuance of a complaint of unfair labor practices or a cease and desist order. It usually files the charge to get an order that will permanently dispose of the jurisdictional dispute on terms acceptable to it as a non-neutral party to the dispute.

297, 301 (1943). That case denied review of a finding of fact issued under a procedure involving "no requirement as to hearings", no subpoena power, and no "order" (320 U.S. 304). The §10(k) hearing and determination procedure set up by Congress is entirely different in character from that involved in *Switchmen's Union*. The irrelevancy of that opinion to the instant case is further indicated by the enactment of the Administrative Procedure Act and 30 years of court holdings on judicial review. See *Barlow v. Collins*, 397 U.S. 159 (1970); *International Longshoremen's Association v. North Carolina State Ports Authority*, ... F.2d ....., 80 LRRM 2930 (4th Cir., June 29, 1972).

An even more far-reaching claim that an administrative adjudication depriving persons of property is free from the due process clause is made by the reliance on *Lindsay v. Normet*, 450 U.S. 56, 77 (1972). In n. 6, the Board switches from its talk of "judicial review" in the body of the brief to talk of "appellate review" in the footnote. This is prelude to its reference to the language in *Lindsay v. Normet*, at 77. This states that the due process clause does not require a state to provide appellate review of a decision reached by "a full and fair trial on the merits" in court. Thus the Board is claiming it is a court rather than an administrative tribunal.

Footnote 6 of the Board's brief in effect urges that this Court should deny the petition on the theory that the "right to due process" does not include a right to judicial review of a Labor Board order

depriving a person of his property, however arbitrary, capricious or unlawful the Labor Board order might be. The Board urges that the opinion below should be sustained despite its direct denial of judicial review of Board orders. It recognizes that this denial is based upon an entirely new proposition that judicial review of an administrative adjudication is "appellate review" and is not the original judicial consideration of the issues that has been required by constitutional law. The Board thus agrees that the opinion below overrules *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and the great body of opinions guaranteeing judicial review and the supremacy of law, as well as overruling the will of Congress as set forth in the Administrative Procedure Act.

II.

PMA claims that Congress intended that the §10(k) order be binding. PMA raises an issue of fundamental importance to the administration of the Act and a claim that there is a conflict between *CBS* and the way the Ninth Circuit applied language of *Plasterers*. On the basis of statutory language and legislative history, PMA asserts that the authority granted by the Act to the Board with respect to jurisdictional disputes is fundamentally different from that granted to it as to other matters. PMA urges that Congress provided a "way to implement the Board's §10(k) decision" by the usual court decree, which would make

the union and the employer "legally bound to observe the §10(k) decision". It asserts *CBS* requires this reading of the Act and that *Plasterers* does not hold to the contrary.

PMA argues that through such a decree the Board will get compliance by the parties to the dispute with the Board's decision as enforced by the court. Thereupon it is to enter a final adjudication dismissing the jurisdictional dispute charge. PMA claims that this "design of the Act" means that the district court retains jurisdiction to enjoin both unions from disturbing the status quo, in which the employer is free to assign the work in dispute as it chooses, until there is a new status that can be enforced upon all by sanction of law.

PMA presents an issue never before litigated in court. It asserts the Act provides this simple and direct means of adjudication with ordinary sanctions of law. The court of appeals side-stepped these fundamental issues when it found, many months after oral argument on the case on March 12, 1971, that there were some words in the *Plasterers* opinion of this Court that could be used to escape its wrestling with the issues.

III.

The due administration of justice in the federal appellate courts cannot be carried on if the courts of appeal are to give mere language of this Court the binding effect given to the *Plasterers* language in the

opinion below. The press of litigation on this Court means that this Court cannot spend the necessary time on each issue before it so as to be certain that every premise that is set out in its opinions is correct in all respects and in all circumstances.[5] As is indicated by the statements of the Justices at the American Bar Association in San Francisco this month, this Court hardly has time to be certain that its statements of its decisions on litigated points are accurate. This means that the courts of appeal must act more like courts of final resort and less like intermediate courts.

The opinion below shows a failure of the court of appeals to carry on its own independent adjudicatory action. It did not wrestle its way through the legal difficulties before it. It ignored the holdings in *Plasterers* and *CBS*, the unique aspects of the statutory language with respect to jurisdictional disputes, the legislative history regarding these disputes, and the practical problems involved.

We do not suggest the courts of appeal should not defer to a holding of this Court. However, the same deference should not be given to every statement in a Supreme Court opinion, even a unanimous opinion. This is particularly true in regard to this Court's words, as to what is assumed to be the meaning of a statute, that have been set forth in reaching a litigated conclusion on a point that is not before the court of appeals.

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[5]The Court's opinions are not written the way Congress writes statutes.

The opinion below rigorously follows words from *Plasterers* that did not develop out of the cross-fire of argument and decision.[6] It relies on these words to hold that the employer is so little affected by the §10(k) proceeding that it has no right to judicial review of the §10(k) order. They are used to support a holding that the Act requires the employer to take a neutral position with respect to "conflicting demands by competing unions that the employer is powerless to satisfy" (457 F.2d 577; Pet. App. 28). The language sanctified as gospel was not a holding on a litigated issue that is pertinent here.[7]

This Court should use this petition as a vehicle for clarifying the need for more independent and intensive adjudication on the part of the courts of appeal. To this end it should summarily remand the matter. It should direct the court of appeals to make

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[6]The Board's brief (5-6) quotes the words but omits footnote 19, which indicates the character of the basis for these words.

[7]The footnote at p. 7 of the Board's brief claims that this language was a holding that is pertinent to the issues raised by the petition. This claim is supported by the erroneous contention that the phrase "we do not find" equates with the phrase "we hold". Furthermore, this footnote improperly brings together two sentences from the opinion. An analysis of the opinion as a whole requires the conclusion that the "we do not find" sentence refers to the conclusion that the employer has the status of a party to the dispute being litigated under §10(k) so as to be entitled to protection under the Act, even when it takes a non-neutral position as to the jurisdictional dispute. Nothing like the contentions raised by PMA as to the meaning of §10(k) was litigated in *Plasterers*. It certainly did not hold that the employer is so little affected by the §10(k) proceeding that it is without right to judicial review and must accept a neutral position as to the substance of the §10(k) order.

its independent judgment of the legal issues, with the suggestion that it may wish to hear further argument as to the effect of the holding in *Plasterers*.

Respectfully submitted,

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August 25, 1972.